In the Supreme Court of the United States.

OCTOBER TERM, 1910.

SIMEON HALLOWELL
v.
THE UNITED STATES. } No. 89.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Hallowell, an Indian, was convicted June 7, 1906, in the District Court for the District of Nebraska, and sentenced to pay a fine of $100 and to imprisonment for sixty days in the common jail of Douglas County in that State. The indictment, returned November 16, 1905, under the act of January 30, 1897 (29 Stat., 506), charged that on August 1, 1905, in that district he introduced intoxicating liquor into the Indian country, to wit, "into and upon the Omaha Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Omaha Indians."

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The Circuit Court of Appeals, to which the case was taken by Hallowell on writ of error, certifies that the following question of law is presented, a decision of which is indispensable to a proper disposition of the case:

> When, under the act of August 7, 1882 (22 Stat., 341), an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the State of Nebraska and a trust patent therefor has been issued to the allottee, and when the provisions of section 7 of the said act of August 7, 1882, and of section 6 of the act of February 8, 1887 (24 Stat., 388), have become effective as to such allottee, does the fact that the United States holds the land so allotted in trust for the allottee, or, in case of his decease, for his heirs, as provided in section 6 of the said act of August 7, 1882, enable, authorize, or permit the United States to regulate or prohibit the introduction of intoxicating liquors upon such allotment during the limited period for which the land so allotted is so held in trust by the United States?

It is stated in the certificate that at the date of the offense Hallowell was an allottee of land in the Omaha Indian Reservation, a trust patent for which had been issued to him under the provisions of the act of August 7, 1882 (22 Stat., 341), and that the twenty-five year period of the trust limitation had not expired.

The certificate further states that the reservation "had been allotted practically in whole." The

report of the Commissioner of Indian Affairs for 1905 (p. 496) gives its exact status: "129,470 acres allotted; the residue, 12,421 acres, unallotted."

All Omaha Indians entitled to allotments, either under the act of August 7, 1882 (22 Stat., 341), or its amendment of March 3, 1893 (27 Stat., 612, 630), had received them, but the reservation at the time of the crime was occupied by 1,221 Indians, under the charge of an Indian superintendent (Ann. Rep. Comm. Ind. Affairs, 1905, p. 248).

A previous certificate by the Circuit Court of Appeals in this case was dismissed, for the reason that the propositions of law involved were not stated with sufficient clearness. (*Hallowell* v. *United States*, 209 U. S., 101.)

ARGUMENT.

Since this case was certified the question involved has been settled by the decisions in *United States* v. *Sutton* (215 U. S., 291), and *United States* v. *Celestine* (215 U. S., 278).

The facts in the *Sutton* case are similar to those now presented. The defendant there was charged, under the act of 1897, with introducing liquor upon a certain allotment within the limits of an Indian reservation in Washington. The allotment there involved was held in trust by the Government and was made under the general allotment act of 1887. Allottees under that act, like those under the Omaha act of 1882, are expressly made subject to the laws, civil and criminal, of the State in which they reside. It was held that, as the Indians are wards of the Government and the beneficiaries of the prohibition against the introduction of liquor, "undoubtedly Congress has the right to forbid the introduction of liquor and to provide punishment for any violation thereof." This decision seems to dispose of the present case.

The *Celestine* case decided that, although an Indian had received an allotment and been made a citizen, the United States might retain jurisdiction and punish him for the murder of another Indian on an allotment in the reservation in a State.

The act of January 30, 1897, indicates the intention of Congress to retain jurisdiction to prohibit the introduction of liquor upon "any Indian allotment while the title to the same shall be held in trust by

the Government." The period of the trust limitation in this case had not expired in 1905, and as above shown, the reservation has not yet been entirely allotted, the Indians residing thereon still remaining in the charge of a superintendent.

The present case, therefore, is governed by both the *Celestine* and *Sutton* decisions. Like the *Celestine* case, it is an offense by one allotted citizen Indian against other Indians committed on a reservation; like the *Sutton* case, it is the introduction of liquor into an Indian reservation in which, as there held, "neither race or color are significant."

Should it be contended that the present case may be distinguished from the *Sutton* case upon the ground that "jurisdiction and control" over Indian lands has not been expressly disclaimed by the State of Nebraska, it would be sufficient to say, in answer, that such a difference is of no significance and has been disregarded by this court. There was no such disclaimer by the State of Wisconsin in the *Couture* case (207 U. S., 581), in which a judgment of conviction for introducing liquor upon an allotment in violation of the act of 1897 was affirmed. Speaking of the *Couture* decision, the court in the *Sutton* case said (p. 296):

> It is true that only a per curiam opinion was filed in that case, and the judgment was affirmed on the authority of *United States* v. *Rickert*, 188 U. S., 432; *McKay* v. *Kalyton*, 204 U. S., 458, but an examination of the record shows that its facts are similar to those in the present case.

Jurisdiction and control over the lands of Indians to which the United States holds title is a necessary consequence of its sovereignty and constitutional authority in respect both to the public lands and the Indians. Van Brocklin v. Tennessee, 117 U. S. 151.

The controlling considerations here are, first, that the United States holds the title in trust and has, therefore, jurisdiction, for the protection of the Indians, to prohibit and provide criminal punishment for the introduction of liquor upon such allotments, just as it has authority, for the protection of settlers and the general public, to prohibit trespasses upon the public lands in a State and punish any violation of its inhibitions (*Jourdan* v. *Barrett*, 4 How., 168, 185; *Gibson* v. *Chouteau*, 13 Wall., 92, 99; *Camfield* v. *United States*, 167 U. S., 518); and second, that the exercise of such jurisdiction is properly based on the guardianship of the Federal Government over the Indians and the necessity for protecting them.

The decision in *Matter of Heff* (197 U. S., 488) concerned a sale of liquor to an Indian outside the limits of the reservation, and therefore is as readily distinguished from the present case as it was from those above referred to.

Further discussion seems unnecessary, and it is respectfully submitted that the question certified should be answered in the affirmative.

For the convenience of the court the statutes, treaties, etc., bearing upon the case are appended.

WILLIAM R. HARR,
Assistant Attorney-General.

APPENDIX.

STATUTES, TREATIES, ETC.

The act of Congress of January 30, 1897 (29 Stat., 506), upon which the indictment was founded, provides:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and *any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government,* or while the same shall remain inalienable

> by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. * * *

The Omaha Reservation was selected by the Indians with the President's approval May 11, 1855 (Ann. Rep. Comm. Ind. Affairs, 1905, p. 496), in accordance with the provisions of a treaty of March 16, 1854 (10 Stat., 1043). A later treaty, dated March 6, 1865 (14 Stat., 667), provides:

> ARTICLE IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land, to include in every case, as far as practicable, a reasonable proportion of

timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha Reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the Superintendent of Indian Affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificate shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned, respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may

> be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress

The act of August 7, 1882 (22 Stat., 341), entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska," under which the Omaha Reservation was allotted and an allotment patent issued to Hallowell, authorizes allotment by the Secretary of the Interior with the consent of the Indians of that portion of the reservation lying east of the right of way of the Sioux City and Nebraska Railroad Company, and provides:

> SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or con-

tract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrict-

> tions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east of west of said right of way mentioned in the first section of this act.

An act of March 3, 1893 (27 Stat., 612, 630), amends the act of August 7, 1882, *supra*, by authorizing allotments "to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, * * * subject to the same conditions, restrictions, and limitations provided for in sections 6, 7, and 8 of said act, touching allotments and patents to allottees therein mentioned."

The general allotment act of February 8, 1887 (24 Stat., 388), passed after the issuance of the patent to Hallowell, provides:

> SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the

> respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

By an act of May 8, 1906 (34 Stat., 182), this section was amended to read as follows:

> SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may

reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple

> patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: * * *.

Exclusive federal jurisdiction of crimes upon this reservation does not appear to have been otherwise expressly reserved by any act or treaty, but the act of May 30, 1854 (10 Stat., 277), organizing the Territories of Nebraska and Kansas, provided (sec. 1):

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Nebraska, until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Nebraska, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

The act enabling the "inhabitants of that portion of the Territory of Nebraska included in the boundaries" therein designated to form a constitu-

tion and state government, approved April 19, 1864 (13 Stat., 47), provided (sec. 4):

> That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States:
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> * * * * *
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> Third. That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the land belonging to residents thereof; and that no taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States.

And the constitution adopted by the people of Nebraska provided, Article XI (Gen. Stat., Nebr., 1873, p. 66):

> SEC. 6. This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States on the condition and faith of the terms of the propositions stated and specified in an act of Congress, approved April 19, 1864, authorizing the people of the Territory to form a constitution and state government, the people of the State of Nebraska hereby accepting the conditions in said act specified.

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